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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-245

NORTH SHORE TRAVEL SERVICE, INC.,

Petitioner,

v.

JOSEPH F. HINTERSEHR, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents, Joseph F. Hintersehr, etc., et al.,[1] respectfully submit this brief in opposition to petitioner's request for a writ of certiorari.

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[1] Joseph F. Hintersehr, Paul R. Ignatius, George A. Buchanan and William M. Hawkins, Jr. are employees of the Air Transport Association of America ("ATA") an unincorporated association whose members consist of the scheduled airlines of the United States. Air Canada, Allegheny Airlines, Inc., Aloha Airlines, American Airlines, Inc., Braniff International, Continental Air Lines, Inc., Delta Air Lines, Eastern Air Lines, Inc., Hawaiian Air Lines, National Airlines, Inc., North Central Airlines, Northwest Airlines, Ozark Air Lines, Piedmont Aviation, Southern Airways, Trans World Airlines, Inc., and United Air Lines, Inc. are members of ATA with the exception of Air Canada which is an associate member.

Opinion Below

The opinion of the district court (App. C of Petition, A-4) is reported at 14 Av. Cas. 17,361. The order of the Court of Appeals for the Second Circuit (App. A of Petition, A-1) which affirmed "on the opinion of Chief Judge Mishler dated September 21, 1976," is reported at 556 F.2d 558.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Did the Court of Appeals correctly affirm the district court's grant of summary judgment where:

(1) Petitioner was attempting to relitigate issues decided adversely to petitioner in a prior state court action; and

(2) Respondents' actions were authorized under an agreement between air carriers approved by the Civil Aeronautics Board, thereby relieving respondents from the operations of the antitrust laws pursuant to § 414 of the Federal Aviation Act of 1958 (49 U.S.C. § 1384).

Statutes Involved

Sections 412 and 414 of the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. 1382 and 1384; and the New York Civil Practice Law and Rules § 7102 are set forth, *infra*, in appendix A.

Statement

The description of the litigation, first in the state courts and later in the federal courts, is set forth fully in the district court opinion of Chief Judge Mishler.

> "This matter was fully litigated in the state courts. Justice Lynde [the state court trial judge] found the checks were appropriately dishonored and that no agreement existed for the bank to pay overdrafts. Moreover, the Appellate Division specifically held that North Shore's allegations were founded on suspicion and not evidence. Hence the doctrine of *res judicata* bars relitigation of the claim." (App. C of Petition, A-13.)

The Second Circuit affirmed on the opinion of Judge Mishler.

Reasons for Denying the Writ

Petitioner's four reasons for granting the writ will be discussed in the order presented in the petition.

I.

There Is No *Erie* Conflict.

Petitioner invoked the jurisdiction of the district court alleging violations of the antitrust laws, 15 U.S.C. §§1, 2 and 15 [146 A].[2] Since this is not a diversity action, the district court was not obliged under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), to apply New York State law when it held that petitioner was collaterally estopped from re-

[2] References in brackets refer to pages of the record contained in the appendix submitted to the Second Circuit.

litigating issues which were actually and necessarily determined in a state court. Nevertheless, New York law is identical on this issue. *Schwartz* v. *Public Administrator of the County of Bronx,* 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969).

II.

There Is No Conflict With the D.C. Circuit.

There is no conflict between this case and *Grueninger International Travel, Inc.* v. *Air Transport Association of America,* 551 F.2d 1324 (D.C. Cir. 1977). Both cases stand for the proposition that where respondent Air Transport Association of America and the airlines act pursuant to procedures expressly authorized by the Civil Aeronautics Board, they are immunized from the operations of the antitrust laws. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973).

III.

Summary Judgment Was Correctly Granted to Respondents.

Petitioner may not defeat summary judgment with bare allegations founded on suspicion and not evidence, *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253 (1968); *Applegate* v. *Top Associates, Inc.,* 425 F.2d 92 (2d Cir. 1970). Furthermore, petitioner may not complain that it did not have adequate pre-trial discovery when it had not only full opportunity for discovery but also a plenary 5 day trial in the state courts in 1974 [16a-19a]. Furthermore, petitioner did not request discovery in the

district court, but rather moved for partial summary judgment in its favor (App. C of Petition, A-5).

IV.

Fay v. *Noia,* 372 U.S. 391 (1963), which concerned only federal habeas corpus jurisdiction, is inapposite, and petitioner's reliance on it is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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The Statutes Involved

I. Federal Aviation Act of 1958

§ 412 [Pub. L. 85-726, title IV, § 412, Aug. 23, 1958, 72 Stat. 770, 49 U.S.C. § 1382]

Pooling and Other Agreements

Filing of Agreements Required

Sec. 412. (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Board

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in

violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

§ 414 [Pub. L. 85-726, title IV, § 414, Aug. 23, 1958, 72 Stat. 770, 49 U.S.C. § 1384]

LEGAL RESTRAINTS

SEC. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

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II. NEW YORK CIVIL PRACTICE LAW AND RULES

§ 7102. Seizure of chattel on behalf of plaintiff.

(a) Seizure of chattel. When the plaintiff delivers to a sheriff an affidavit, order of seizure and undertaking and, if an action to recover a chattel has not been commenced, a summons and complaint, he shall seize the chattel in accordance with the provisions of the order and without delay.

(b) Service. The sheriff shall serve upon the person from whose possession the chattel is seized a copy of the affidavit, order of seizure and undertaking delivered to him by the plaintiff. Unless the order of seizure provides otherwise, the papers delivered to him by the plaintiff, shall be personally served by the sheriff on each defendant not in default in the same manner as a summons or as provided in section 314; if a defendant has appeared he shall be served in the manner provided for service of papers generally.

(c) Affidavit. The affidavit shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;

2. that the chattel is wrongfully held by the defendant named;

3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;

4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed; and

5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel in the place where the chattel may be, facts sufficient under the due process of law requirements of the fourteenth amendment to the

constitution of the United States to authorize the inclusion in the order of such a provision.

(d) Order of seizure. 1. Upon presentation of the affidavit and undertaking and upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States, the court shall grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place where the chattel may be.

2. If the order of seizure does not include the provision permitted by paragraph one of this subdivision, the court shall grant a restraining order that the chattel shall not be removed from the state if it is a vehicle, aircraft or vessel or, otherwise, from its location, transferred, sold, pledged, assigned or otherwise disposed of or permitted to become subject to a security interest or lien until further order of the court. Unless the court otherwise directs, the restraining order does not prohibit a disposition of the chattel to the plaintiff. Disobedience of the order may be punished as contempt of court.

(e) Undertaking. The undertaking shall be executed by sufficient surety, acceptable to the court. The condition of the undertaking shall be that the surety is bound in a specified amount, not less than twice the value of the chattel stated in the plaintiff's affidavit, for the return of the chattel to any person to whom possession is awarded by the judgment, and for payment of any sum awarded by the judgment against the person giving the undertaking.

A person claiming only a lien on or security interest in the chattel may except to the plaintiff's surety.

(f) Disposition of chattel by sheriff. Unless the court orders otherwise, the sheriff shall retain custody of a chattel for a period of ten days after seizure. At the expiration of such period, the sheriff shall deliver the chattel to the plaintiff if there has not been served upon him either a notice of exception to plaintiff's surety, a notice of motion for an impounding or returning order, or the necessary papers to reclaim the chattel. Upon failure of the surety on plaintiff's undertaking to justify, the sheriff shall deliver possession of the chattel to the person from whom it was seized.